

MID-ATLANTIC FISHERY MANAGEMENT COUNCIL

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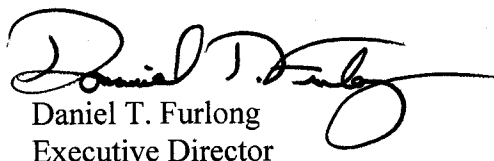
August 12, 2008

Alan Risenhoover, Director
Office of Sustainable Fisheries, NMFS
1315 East-West Highway, SSMC3
Silver Spring, MD 20910

Dear Mr. Risenhoover:

The attached comments regarding NMFS' Proposed Rule on Environmental Review Process for Fishery Management Actions were provided electronically via email on August 12, 2008. For record keeping purposes, I am providing the same comments via mail.

Sincerely,


Daniel T. Furlong
Executive Director

DTF:mjb

Attachments: NEPA-MSA comments

Comments of the Mid-Atlantic Fishery Management Council

Regarding:

NMFS' May 14, 2008 Proposed Rule on Environmental

Review Process for Fishery Management Actions

Submitted by:

Daniel T. Furlong, Executive Director, on Behalf of the Council

By way of background, the National Environmental Policy Act (NEPA) process consists of an evaluation of the environmental effects of federal actions including potential alternatives. There are three levels of analysis depending on whether or not an action could significantly affect the environment. These three levels include: categorical exclusion determination; preparation of an environmental assessment/finding of no significant impact (EA/FONSI); and preparation of an environmental impact statement (EIS).

At the first level, an action may be categorically excluded from a detailed environmental analysis if it meets certain criteria which a federal agency has previously determined as having no significant environmental impact. Frankly, this is where all of our fishery management actions should fit inasmuch as they have little long term effect on marine environment.

At the second level of analysis, a written environmental assessment (EA) is developed to determine whether or not a federal action would significantly affect the environment. If the answer is no, the federal agency issues a finding of no significant impact (FONSI). The FONSI may address measures which the agency will take to reduce or mitigate potentially significant impacts.

If the EA determines that the environmental consequences of a proposed federal action may be significant, an Environmental Impact Statement (EIS) is prepared. An EIS is a more detailed evaluation of the proposed action and potential alternatives. The public, other federal agencies and outside parties may provide input into the preparation of an EIS and then comment on the draft EIS when it is completed.

After a final EIS is prepared and at the time of its decision, the federal agency will prepare a public record of its decision (ROD) addressing how the findings of the EIS, including consideration of alternatives, were incorporated into the agency's decision-making process.

That in a nutshell this is what NEPA requires.

The purpose of the Magnuson Stevens Act (MSA) is to take immediate action to conserve and manage the fishery resources found off the coasts of the United States [MSA Section 2, (b), (1)]. NEPA is a process Act whereas MSA is an action (or substance) Act. Nonetheless, MSA is also a process Act. It charges Councils to meet with the public [MSA Section 302, (h), (3)] to gather input regarding fishery management plans. It provides procedural guidelines that ensure the public due process rights regarding notice and opportunity to comment on all Council activities [MSA Section 302 (i)]. Section 303 (a) enumerates and describes what provisions are required of Fishery Management Plans (FMP), the ninth requirement of these fifteen statutorily requirements includes the development of a fishery impact statement. In addition to these Council requirements, the Secretary of Commerce is tasked by MSA at Section 304 (a) and (b) to review FMPs and their implementing regulations in a prescribed manner and within certain specified timelines.

When the MSA was reauthorized in late 2006, Congress included a charge to revise and update procedures for compliance with NEPA so that these revisions and updates would be **the sole environmental impact assessment procedure** for FMPs, Amendments, regulations or other MSA actions. The recently reauthorized MSA has not eliminated any of the "process" provisions of Sections 303 and 304 of MSA. Hence, one could argue that if the Councils and NMFS meet their responsibilities under these Sections, then the process requirements of NEPA would also be satisfied. This is our view. However, we doubt that this would satisfy the MSA's new requirement to revise and update agency procedures to comply with NEPA. Nonetheless, the existing process aspects of the MSA should weigh heavily in the outcome regarding the current Proposed Rule to meet the MSA Section 304 (i) requirement since honoring these existing MSA requirements meets the bulk of what is required under NEPA.

With this background established, the Mid-Atlantic Council would support the agency's published approach only if it were changed to more accurately reflect Congressional intent by explicitly incorporating NEPA into the MSA process rather than adopting what appears to be a framework process modeled entirely on the Council of Environmental Quality's (CEQ) regulations. This construction of a single process driven by NEPA process requirements effectively reduces MSA to a secondary driver for fishery management actions. The proposed procedures recognize the Council process as the appropriate place for development of fishery management actions, and for substantial public involvement in that process. However, we are concerned that the proposed new procedure merely dumps all existing CEQ regulations into a fishery-specific context (rather than focus on applicable environmental review procedures), would reduce Council control of its own process, and increase the agency's control over that process. We are particularly concerned that the procedures would allow the agency to define alternatives that have to be developed by the Council process for ultimate review by the Secretary.

The current process allows NMFS the final authority over Council recommendations, and in fact it is NMFS that determines when our overall 'package' (including NEPA documentation, MSA requirements, and requirements of other applicable laws) is complete and ready for Secretarial review. The proposed rule does not change this process. However, there are several places in the proposed rule that specifically vest NMFS with authority over the revised process, but do not specify the Councils' role other than to allude to a 'consultation' with the Council. Owing to this circumstance, we are concerned that these decisions will be made unilaterally by NMFS since everything would now be wrapped around and within the NEPA document and NMFS would have complete responsibility for the entire package.

Another concern we have is that the revised procedures are largely a change in semantics, e.g., replacing the term 'EIS' with the term 'IFEMS', and do not really change or streamline the process from its existing structure. To implement a revised procedure that merely cements the status quo is not revising or updating agency procedures as nothing substantively will change.

There are a number of instances where open-ended authority is bestowed upon NMFS to issue guidance on critical aspects of rulemaking, at a national or regional level. The uncertainty implied by this open-endedness, together with the exclusion of the Councils in developing this 'guidance' creates an additional, significant concern on the part of this Council. The determination of significance, relative to a FONSI determinations and deciding the issue of whether to prepare an EA or an IFEMs are but two examples of how this proposed rule is stacking the decisions at the agency level and not the Council level. If this is to be a cooperative initiative, then decision making should be shared rather than reserved to only one partner.

Despite our reservations mentioned above, the Proposed Rule does integrate the two procedural processes (MSA and NEPA) and sets in place opportunities to more efficiently arrive at management decisions / actions. It is this promise of one process, merged timelines, and streamlined efforts that permits us to support the agency's Proposed Rule.